In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1213

LOU DE YOUNG'S MARKET BASKET, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. On December 8, 1964, Local 20, Retail Clerks International Association, AFL–CIO, began soliciting authorization cards at petitioner's Grand Rapids store (Pet. App. 35). The Company responded with an anti-union campaign which included threats of reprisal and surveillance, coercive interrogation, restraints on union solicitation, and the discharge of three employees for their union activities (Pet. App. 16–21).

By December 16, the Union had obtained signed authorization cards from a majority of the employees (Pet. App. 23, n. 8); it approached the Company's vice-president, orally requested recognition, and offered the authorization cards for examination (Pet.

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App. 40). The vice-president refused to discuss the request and threatened to have the Union representative ejected from the premises if he persisted (Pet. App. 40–41). Later the same day, the vice-president threatened an employee with reprisals should the union come in (Pet. App. 41).

The Union also wrote a letter to the Company on December 16, confirming its request. Having received no reply by December 21, the Union filed a representation petition with the Board. On December 22, the Company rejected the Union's claim of majority representation, but offered to cooperate in arranging for an election (Pet. App. 41).

2. The Board found that the Company's anti-union campaign violated Sections 8(a) (1) and (3) of the Act (Pet. App. 17–21) and that the Company had violated Sections 8(a) (5) and (1) of the Act by its December 16 denial of recognition, since the Union then possessed valid authorization cards from a majority of the employees in an appropriate unit, and the Company's "refusal was not motivated by a good-faith doubt of the Union's majority status inasmuch as there is clear evidence of unlawful efforts, both before and after the refusal, to thwart the employees' union activities and to gain time in which to dissipate that majority" (Pet. App. 28–29). The Board ordered the Company to cease and desist from its unfair labor practices, to reinstate the discriminatorily discharged employees with backpay, and to bargain, upon request, with the Union (Pet. App. 29–31).

The court of appeals sustained the Board's findings and enforced its order in full. The court stated: "Violations of Section 8(a)(1) of the Act may indicate that an employer's assertions of good faith doubt are spurious [citation omitted], especially where such violations are of the 'flagrantly coercive' type, or where an employer continues to commit unfair labor practices after a bargaining demand has been made" (Pet. App. 45–46).

3. But for the similarity to cases now submitted and awaiting decision in this Court, *National Labor Relations Board* v. *Gissel Packing Co.*, No. 573; *Food Store Employees Union, Local No. 347* v. *Gissel Packing Co.*, No. 691; and *The Sinclair Company* v. *National Labor Relations Board*, No. 585, the petition presents no questions warranting review by this Court. Thus, the second question assigned simply challenges a factual finding made by the Board and sustained by the court of appeals that the refusal to bargain occurred on December 16 (Pet. App. 21–22, 45, n. 6). And the fourth question assigned ignores the Board's finding, also sustained below, that the Company's refusal to recognize the Union was based not on any doubt about the appropriateness of the unit, but on a desire to undermine the Union (Pet. App. 21–22, 44–45). In any event, the appropriateness of a particular bargaining unit is usually a legal issue, so that an employer's erroneous belief, even in good faith, affords no defense to a refusal to bargain charge. See *National Labor Relations Board* v. *Bardahl Oil Co.*, 399 F. 2d 365, 368–370 (C.A. 8), and cases cited therein.

The Board acknowledges that the opinions below do rest on the proposition, challenged in the pending cases, that an employer may be ordered to bargain with a union whose majority status is evidenced by authorization cards if it is found that his refusal to recognize and bargain with the union was motivated, not in good faith by any doubt as to its majority, but by a desire "to thwart the employees' union activities and to gain time in which to dissipate [the union's] majority" (Pet. App. 28–29). Thus, it is doubtful that the Board's finding would have been sustained under the Fourth Circuit ruling in *Gissel, supra.* However, the Board believes that these issues have been adequately presented in those cases and that there are no special circumstances in this case warranting separate consideration.

Accordingly, the Board suggests that the Court should defer ruling on the present petition until it decides Nos. 573, 691, and 585.

Respectfully submitted.

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